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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

ALDO GUERRINI,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Aldo Guerrini, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause March 31, 1948 (R. 151).

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (Abruzzo, D. J.) has not been officially reported, but appears in the record at p. 129. The

district court entered findings of fact (R. 132) and conclusions of law (R. 133). The opinion of the Circuit Court of Appeals for the Second Circuit appears in the record at p. 145 (L. Hand, Swan and Frank, JJ.), and is reported in 167 F. 2d 352.

Jurisdiction

The judgment of the circuit court of appeals was entered on March 31, 1948 (R. 151). The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended (c. 229, 43 Stat. 936, 938, as amended; 28 U. S. C. § 347).

Questions Presented

1. Whether a shipowner in control of a vessel is obligated to provide a seaworthy vessel and a safe place to work for an employee of an independent contractor employed on board the vessel in cleaning her tanks and boilers.

2. Whether the right of an employee of an independent contractor to recover damages for injuries sustained while employed on board a vessel under the control of a shipowner to clean her tanks and boilers depends upon the local law or the law of the sea.

3. Whether a circuit court of appeals sitting in admiralty may determine the comparative negligence of both parties to the suit in the absence of determination of the degree of negligence of each party.

Statutes Involved

The Suits in Admiralty Act, c. 95, 41 Stat. 525, 46 U. S. C. c. 20, §§ 741 *et seq.*; provides in part:

> *Sec. 1.* No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of

such corporation or operated by or for the United States or such corporation . . . shall . . . be subject to arrest or seizure by judicial process in the United States or its possessions . . .

Sec. 2. In cases where if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . .

Sec. 3. Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . . Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. . . ."

Statement

This is a suit by petitioner against respondent under the *Suits in Admiralty Act, supra,* to recover for personal injuries sustained by petitioner in the course of his work.[1] At the time the injuries were sustained, petitioner was an employee of a contracting company engaged in the work of cleaning tanks on board the *William B. Giles,* a troop-carry-

[1] This action is not based upon the Jones Act, which is restricted to actions by employees (seamen) against employers, but is based upon the breach of the traditional obligation on the part of vessel owners to provide a seaworthy vessel and a safe place to work for those who perform on board the vessel the ship's service with the owner's consent or by his arrangement. It involves no question of the Longshoremen and Harbor Workers Compensation Act for the reasons set forth in the opinion of this Court in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 100-101.

ing liberty ship owned by respondent and tied to a wharf in the East River in Brooklyn. (Fdgs. 1-2.)

Petitioner and a co-worker were lowering a bale of rags weighing about a hundred pounds into a hatch. The rags were used in cleaning the fresh-water tanks at the bottom of the hold. While petitioner was lowering the bale of rags just over the hatch coaming, he slipped on grease and oil on the deck, lost his balance, and the weight of the bale of rags caused him to be drawn over the hatch coaming, so that he fell into the hold. He received severe personal injuries. (Fdgs. 3-4, R. 132-3.) Respondent was in control of the ship; knew that employees of the contractor cleaning the tanks were working around the hatch and had to use the deck around the hatch during the course of their work; and negligently left grease on the deck around the hatch. (Fdgs. 5-6, R. 133.) Petitioner's injuries were received as a result of this negligence of respondent. (Fdg. 6; concl. 1, R. 133.) The district court found that there was no contributory negligence on the part of petitioner. (Concl. 2, R. 133.)

The Circuit Court of Appeals for the Second Circuit reversed. (R. 145.) It recited the trial court's findings of negligence of the vessel, and petitioner's freedom from contributory negligence or assumption of risk, and held that it could not "say that it was 'clearly erroneous' to find that the libellant [petitioner] fell into the hold because he slipped upon the grease". (R. 146). It held that it was necessary to determine whether there is applicable to this case the doctrine expressed by this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, holding a shipowner liable to a stevedore for breach of an implied duty to make the ship seaworthy; and while it thought it impossible to be sure how far the "new doctrine" may go, it hesitated to apply that doctrine to this workman even though petitioner's work could be, like that of the stevedore in the *Sieracki* case,

"equally regarded as part of the 'ship's service' ". (R. 146-7.) It felt that petitioner's relationship to respondent was that of a "business guest", so that the shipowner's liability depended upon the law of New York rather than the admiralty law, and refused to follow the view of the highest court of the State of New York which has recently held the law of the sea, rather than local law, to be applicable. (R. 147-148.) Upon a review of the local law, it found that the duty of petitioner was the same as that of employer to employee. It held that the finding that respondent was negligent "is not a finding of fact" (R. 150); and it thought that there must be a specific finding as to how long the grease had been on the deck. If on the remand petitioner does satisfy the judge that the grease had been left in the place where he slipped so long that it should have been noticed by the officer on watch, then, considering that petitioner must have been either totally indifferent to any possibility of danger, or have paid no attention to his footing, he may recover in the proportion of one to four. (R. 150.)

Specification of Errors to be Urged

The court below erred:

1. In holding that local law (the law of New York) rather than the law of the sea applies to this proceeding.

2. In holding that the law of the sea does not require a shipowner in control of a vessel to provide a seaworthy vessel and a safe place to work for an employee of an independent contractor employed on board the vessel in cleaning her water tanks.

3. In holding that the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, is inapplicable in this case.

4. In holding that the court might make its own finding of fact or mixed question of law and fact with respect to the

negligence or comparative negligence of the respective parties.

5. In deciding in favor of respondent and against petitioner.

Reasons for Granting the Writ

The decision of the court below that the petitioner must prove respondent's negligence by showing that the unsafe condition of the vessel had existed for sometime is, of course, based upon the court's assumptions (a) that the local law rather than the law of the sea applies to this proceeding, and (b) that the application of the doctrine of this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, is limited to stevedores and does not extend to other employees of independent contractors employed on board a vessel which is under the control of the shipowner to perform part of the "ship's service"; for if the law of the sea and the doctrine of the *Sieracki* case apply, it is clear that respondent was obligated, without regard to its fault, to provide a seaworthy vessel and a safe place for petitioner to work. *Sea Shipping Co., supra*, 100-101; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96. The court's decision that petitioner was guilty of contributory negligence because he "must have been either totally indifferent to any possibility of danger, or have paid no attention whatever to his footing" must likewise depend upon its assumptions that the law of the sea and the doctrine of the *Sieracki* case do not apply; for if the law of the sea and the doctrine of the *Sieracki* case apply, petitioner had every right to assume and to act upon the assumption that respondent had complied with its obligation to furnish a seaworthy vessel and a safe place to work (*Mahnich* v. *Southern S. S. Co., supra; Krey* v. *United States* (C. C. A. 2d, 1941), 123 F. 2d 1008) and he could not have been negligent because he did not look for danger when

he had no reason to apprehend any. *Sears, Roebuck & Co.* v. *Scroggins* (C. C. A. 8th, 1944), 140 F. 2d 718, 723.

1. The decision of the court below, sitting in New York, conflicts with the decision of the New York Court of Appeals in *Riley* v. *Agwilines*, 296 N. Y. 402, on a matter in which both courts have concurrent jurisdiction, with respect to the law by which the duties and rights of the parties are to be determined. This conflict is recognized by both courts. The conflict revolves about, and is recognized by both courts through reference to, an earlier decision of the court below in *Puleo* v. *H. E. Moss, Inc.* (C. C. A. 2d, 1947), 159 F. 2d 842. The New York Court of Appeals held in *Riley* v. *Agwilines, supra* (an action under the maritime jurisdiction for wrongful death of a stevedore who fell through an uncovered hatch):

> " 'Notwithstanding the State court has concurrent jurisdiction with the Federal courts to entertain the suit (*Messel* v. *Foundation Co., supra;* [*Spencer*] *Kellog & Sons, Inc.* v. *Hicks,* 285 U. S. 502, 514, 52 S. Ct. 450, 453, 76 L. Ed. 903) and the action is brought in the State court, the principles and rules of the substantive maritime law are alone to be applied as ground, if any, for recovery. *Robins Dry Dock & Repair Co.* v. *Dahl, supra; Chelentis* v. *Luckenback S. S. Co., supra; Southern Pac. Co.* v. *Jensen,* 244, U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C 451, Ann. Cas. 1917E, 900.' 274 N. Y. at Pages 129, 130, 8 N. E. 2d at page 304. That was—as this is—an action for wrongful death under the local State statute which affords an appropriate remedy but does not modify the substantive maritime law upon which the rights and obligations of the parties arise. We are not unmindful of the recent decision in *Puleo* v. *H. E. Moss & Co.*, 2 Cir., 1947, 159 F. 2d 842, where an action was brought for wrongful death arising under the New York statute. If there is anything in that case contrary to our decision in *Kuhn* v. *City of New York, supra,* we are nevertheless con-

strained to reaffirm the rule there stated, since the decision in that case was predicated upon our understanding of the applicable decisions of the Supreme Court of the United States."

The court below (in this action under the maritime jurisdiction for personal injuries to a workman who fell through a hatch) held (R. 147-148):

> "We held in *Puleo* v. *H. E. Moss, Inc.* [159 Fed. (2) 842] that the employee of a sub-contractor engaged in freeing a tanker's piping of gasoline was in the position of a 'business guest,' and that the shipowner's liability depended upon the law of New York, the ship being moored to a wharf in this port. In *Riley* v. *Agwilines, Inc.* [296 N. Y. 402] the Court of Appeals of New York pointed out that in so holding we had ignored several decisions of the Supreme Court [*Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U. S. 449; *Messel* v. *Foundation Co.*, 274 U. S. 427, 434; *Spencer Kellogg & Sons, Inc.*, v. *Hicks*, 285 U. S. 502, 514] which, following *Southern Pacific Co.* v. *Jensen* [244 U. S. 205] had held that in cases closely parallel the law of the sea displaced the local law. Whether those decisions are still law depends upon what is left of the whole doctrine of *Southern Pacific Co.* v. *Jensen, supra*, which has proved to the last degree difficult in application, even in the field of workmen's compensation where it arose. The Supreme Court had for long obviously continued to recognize it at all only with mounting reluctance [*Just* v. *Chambers*, 312 U. S. 383, 392; *Parker* v. *Motor Boat Sales Co.*, 314 U. S. 244; *Davis* v. *Department of Law*, 317 U. S. 249]; and in *Standard Dredging Co.* v. *Murphy* [319 U. S. 306], Justice Black for a unanimous court declared that 'the *Jensen* Case has been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws' (p. 309). * * *"

It is respectfully submitted that the Court below erred in assuming the question depended upon "what is left of the

whole doctrine of *Southern Pacific Co.* v. *Jensen*", 244 U. S. 205. Irrespective of the extent to which that case is still law, this Court plainly decided in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, that the rights of one "performing a function essential to maritime service on board a ship (*supra*, p. 97)"—as was true of this petitioner—were determined by the federal admiralty law. "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law", *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244. The case, therefore, presents the same anomalies in the law which existed under the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, prior to this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64—that is, an individual's rights, under the same factual situation and in the same state, vary as he (or his opponent) chooses a state or a federal court.

2. The decision of the court below is in conflict with the decision of the Fourth Circuit in *State of Maryland* v. *United States*, 165 F. 2d 911. The court below held that local law, the law of New York, rather than the law of the sea, applies to this proceeding. In *State of Maryland* v. *United States, supra*, the Fourth Circuit applied the law of the sea and not the local law in a situation closely parallel to the case at bar. In the Fourth Circuit case the State of Maryland was suing for the use of the surviving widow and surviving mother of an employee of the American Ship's Service Co., an independent contractor, which had contracted to clean the holds of respondent's vessel. In each case the vessel was tied to a dock in navigable waters within the concurrent jurisdiction of a state. In each case the vessel was under the control of the respondent. In the case at bar, the petitioner was injured while employed on board the vessel by an independent contractor to clean

its water tanks. In the Fourth Circuit case, libellant's decedent was killed while employed on board the vessel by an independent contractor to clean its holds. It is true that in the Fourth Circuit case the libellant's decedent was called a stevedore by the court and in the case at bar the petitioner is not so called by the circuit court of appeals but is by the district court (R. 130, 132), but in both cases the actual activities of the person injured and his relationship to the shipowner were substantially identical. The Second Circuit refused to apply the law of the sea and applied the local law, in that case, the law of New York. The Fourth Circuit applied the law of the sea.

3. The decision of the court below is inconsistent with the decision of this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

In the *Sieracki* case, this Court held that a vessel owner was liable for its failure to provide a seaworthy vessel and a safe place to work for an employee of an independent contractor, a stevedoring company, on the ground that the employee was performing "the ship's service with the owner's consent". 328 U. S. at p. 95. To the contrary, the court below has held that there is no liability towards the petitioner—the employee of an independent contractor engaged in cleaning the vessel's tanks and boilers—although it recognized that cleaning a ship's tanks and boilers may be regarded equally with loading a vessel as part of the "ship's service". The court below said:

> "* * * The grounds of the majority in *Seas Shipping Co.* v. *Sieracki, supra,* were that a stevedore performs part of the 'ship's service,' more particularly that: 'Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew' (p. 96). The work of cleaning a ship's tanks and boilers may be equally regarded as part of the 'ship's service,' and presum-

ably such work in the past was done by the crews; and, for that matter, much of the upkeep of a ship has always been done by the crew, and still is, at least at sea. A modern ship for example carries, not only the traditional ship's 'carpenter,' but at times a substantial complement of repairmen, [fol. 148] who are members of the crew, and are protected by an implied duty that she shall be seaworthy. It is impossible to be sure how far the new doctrine may go, for everything done on board a ship contributes to her 'service,' if it helps to make and keep her ready for her work; and probably all but major structural repairs were, at least in early times and elsewhere than in the home port, often made by the crew. Yet we should hestitate to read the decision as intended to extend the protection of what amounts to a warranty of seaworthiness to all workmen upon a ship, however casual their presence there, and however much their relation to the employer is unlike the early paternalistic status of master and crew, many of whose features have vestigially persisted to the present time. At any rate it is proper, if such an innovation is to be made, that it should await the sanction of the Supreme Court in the exercise of its function of supplying the inadequacies of the past. * * * "

It should be noted that the court below suggests in the portion of the opinion quoted above that the situations to which the doctrine of the *Sieracki* case is applicable can be decided only by this Court.

4. The decision of the court below is inconsistent with the decision of this Court in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424.

The court below held that the fact of negligence and *a fortiori* the degree of negligence of the respondent had not been established. Yet, it found the degree of negligence of the petitioner to be three times as great as the unknown negligence of the respondent. (R. 149, 150.)

This Court held in the *Socony-Vacuum* case, *supra*, 432-433, that the verdict in a similar situation depended upon a jury's determination under appropriate instructions of the trial court of the relative degrees of petitioner's and respondent's negligence.

Conclusion

The writ ought to be granted.

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(7072)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 115

ALDO GUERRINI,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ARTHUR M. BECKER,
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Argument

1. The respondent's brief makes no effort to distinguish *Riley* v. *Agwilines,* 296 N. Y. 402, which conflicts with the decision of the court below. Since this conflict is expressly recognized by both courts, the exercise of this Court's jurisdiction is required.

a. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, requires that the judgment of the court below be reversed. In both cases the petitioner was the employee of an independent contractor; in both cases he sued the owner of the vessel who "had not surrendered control" (R. 146); in both cases the work performed by the petitioner was found by the court to be "part of the 'ship's service' " (R. 147). Yet in the

Sieracki case this Court held that the petitioner was protected by the Admiralty Law and that the shipowner consequently was duty-bound to furnish him with a seaworthy ship. In the present case the court held that the petitioner was not protected by the Admiralty Law and that the respondent was *not* duty-bound to furnish him with a seaworthy ship (R. 147); and, consequently, that the burden was upon the petitioner to prove the respondent negligent under the laws of the State of New York. The work performed by the injured workman in each case was work traditionally performed by the crew. The doctrine of the *Sieracki* case was summed up by the United States Court of Appeals for the Sixth Circuit (*Meyers* v. *Pittsburgh S. S. Co.*, 165 F. 2d 642, 643):

> "The Supreme Court, however, in the *Sieracki* case, supra, developed a broader concept applicable to maritime torts. The obligation which a shipowner owes to its seamen it is not free to nullify by parcelling out the operations to intermediary employers, and that liability attaches even though the owner is without fault. It arises not merely from contract but from the fact of service to the ship with the owner's consent. * * *"

This case accordingly presents no question of extending the doctrine of the *Sieracki* case; the question presented is whether that case shall be followed uniformly throughout the admiralty jurisdiction or whether each Federal court and each State court shall independently determine the law applicable to such maritime causes.

The cases cited by the respondents are not analagous. In *Bruszewski* v. *Isthmian S. S. Co.* (C. C. A. 3d, 1947), 163 F. 2d 720, cert. den. 333 U. S. 828, performance of the ship's service was not involved. The petitioner was employed to repair a broken boom of a vessel, which had thereby become unseaworthy. Obviously no warranty by the respondent could be implied that the boom was not broken. *Puleo* v.

H. E. Moss, Inc. (C. C. A. 2d, 1947), 159 F. 2d 842, cert. den. 331 U. S. 847, was one of the cases out of which the conflict between the court below and the New York Court of Appeals arises, as pointed out by that court in *Riley* v. *Agwilines,* 296 N. Y. 402. In the *Puleo* case, as in the present case, the Second Circuit held that the liability of the respondent must be determined in accordance with state law and that consequently it was the petitioner's obligation to prove the respondent negligent as to a "business guest" (R. 148-9). It was with this conclusion that the New York Court of Appeals disagreed. This Court's denial of certiorari was prior to the time the conflict developed through the decision of the New York Court of Appeals in *Riley* v. *Agwilines, supra.* Further, the question of which law should apply was not involved in the petition for certiorari before this Court. The Second Circuit in the *Puleo* case found the respondent to be negligent. The petition for certiorari sought to obtain a review of that determination. It was utterly immaterial in passing upon that petition to decide whether the respondent would also have been liable because of failure to provide a seaworthy vessel had he not been negligent under the New York law as well. *Armento* v. *United States* (E. D. N. Y., 1947), 74 F. Supp. 198, is merely an instance of the District Court in New York following, as it was obliged to follow, the earlier ruling of the Second Circuit in the *Puleo* case.

The *Sieracki* case in this Court, *Riley* v. *Agwilines* in the Court of Appeals in the State of New York, and the present case in the Circuit Court of Appeals for the Second Circuit each involve substantially the same set of facts, and are in irreconcilable conflict.

b. The proposition that petitioner cannot avail himself of the *Sieracki* rule since his libel was not based on unseaworthiness and that it is only here that the *Sieracki* case is

"seized upon" is in complete disregard of the record. The question, under the traditional admiralty test is whether respondent was negligent in failing to provide a seaworthy vessel—a safe place in which to work;[1] and this is the negligence asserted by the libel, ¶ 6, R. 4. Nor is the point first made in this Court. The trial court considered the *Sieracki* case and found it applicable (R. 130). The court of appeals considered the *Sieracki* case at length (R. 146-148). This case is presented to this Court on precisely the rulings of the courts below.

2. The proposition that even if the Federal maritime law applied, the result would not be different, is not well taken. For it was only by finding the Federal maritime law and the *Sieracki* case inapplicable that the court below was able to reverse the judgment of the District Court in favor of petitioner. None of the cases cited by respondent[2] holds or implies that one performing the ship's service in the place of a member of the crew is not entitled to the observance of the standard of care provided by the maritime law for a seaman as this Court held not later than the *Sieracki* case (and see *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 61-62). Nor was the point here involved even in-

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[1] This Court has referred to the liability as stemming from "the negligent failure to provide a seaworthy ship and safe appliances." *The Arizona* v. *Anelich*, 298 U. S. 110, 123.

[2] The cases cited by respondent variously hold that an owner was liable for its negligence—(1) in permitting an accumulation of oil on the deck (though not liable to an injured seaman suing under the Jones Act, where he had assumed the risk), *Holm* v. *Cities Serv. Tr. Co.* (C.C.A. 2d, 1932), 60 F. 2d 721; (2) in placing explosive oil in a tank the owner knew would be drilled in the presence of fire, *McGill* v. *Michigan S.S. Co.* (C.C.A. 9th, 1906), 144 Fed. 788; (3) in carelessly stowing cargo, with resulting injury to a stevedore, *La Guerra* v. *Brasileiro* (C.C.A. 2d, 1942), 124 F. 2d 553, cert. den. 315 U. S. 824; (4) in leaving a hatch improperly secured, with resulting injury to a stevedore, *Consolidation Coatswise Co.* v. *Conley* (C. C. A. 1st, 1918), 250 Fed. 679; (5) in providing an unsafe ladder for a stevedore to climb, *Grillo* v. *Royal Norwegian Govt.* (C.C.A. 2d, 1943), 139 F. 2d 237.

directly presented by the cases respondent cites. All of those cases hold the owner liable for its negligence; and if it was liable for direct negligence, there was manifestly no occasion to consider whether it would have been liable for failing to provide a seaworthy vessel and a safe place to work. *Seas Shipping Co.* v. *Sieracki, supra,* 328 U. S. at p. 94. Finally, the cases cited arose prior to the *Sieracki* case, and were not tried on the theory of that case as were *Riley* v. *Agwilines* and the present case.

The intimation (Brf. Opp. pp. 7-8) that the court below actualy did follow the Federal maritime law since it viewed petitioner's alleged contributory negligence not as a bar to recovery but only in reduction of damages, is ill-founded. The forum was an admiralty court, and the rule thus applied was procedural with an admiralty court. The substantive law which the court below applied—wrongfully, we submit —was the State law. The capacity of an admiralty court to hear matters arising entirely under state law is an ancient one, and does not demonstrate that the court here actually applied the Federal maritime law (which it says it did not, R. 147-148), or applied it correctly (which, under the *Sieracki* case, it did not). See *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240.

Respectfully submitted,

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 115

ALDO GUERRINI, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the United States District Court for the Eastern District of New York (R. 129–133) are not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 145–150) is reported at 167 F. 2d 352.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 31, 1948 (R. 151). The petition for a writ of certiorari was filed on June 23,

1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, apart from any question of negligence or lack of contributory negligence, a shipowner is absolutely liable for personal injuries sustained by an employee of an independent contractor engaged in cleaning the ship's tanks while the ship is docked in a private shipyard for general overhauling and repair.

STATUTES INVOLVED

The pertinent provisions of the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. 741 *et seq.*) are set forth in the Appendix, *infra*, pp. 10–11.

STATEMENT

In October 1944, the S. S. *William B. Giles*, a vessel owned and operated by the United States and employed as a troop transport, returned to the United States from a European voyage (R. 129, 132). Prior to another voyage to England with an additional shipload of troops, the vessel was docked at a wharf of the Continental Shipbuilding Company's Brooklyn shipyard (R. 21, 97) for the purpose of general repairs and overhauling (R. 98, 127, 132, 145). Continental hired the Bell Contracting Company, as a subcontractor, to clean the ship's boilers and tanks as part of the general

overhauling (R. 76, 145). Petitioner, a bricklayer by trade (R. 24), was engaged, on October 4, 1944, in this tank-cleaning work (R. 21) as an employee of the subcontractor (R. 20), when the injuries he complains of were sustained.

On October 15, 1945, petitioner filed in the District Court for the Eastern District of New York a libel against the United States under the provisions of the Suits in Admiralty Act of 1920 "and all Acts supplemental and amendatory thereto,"[1] claiming $25,000 in damages for his personal injuries and alleging that such injuries were caused by his having slipped and fallen as a result of the negligence of the United States in allowing oil and grease to accumulate on the deck where libellant was required to work (R. 3–5). The answer of the United States to the libel denied negli-

[1](R. 3, 5, 145.) The petition (Pet. 3) states that this is a suit under the Suits in Admiralty Act and, in fact, quotes the pertinent provisions, including Section 2 of that statute. Section 2, it must be noted, confers a right of suit against the United States only in those situations where the United States-owned vessel "is employed as a merchant vessel." As already indicated the *William B. Giles* was not employed as a merchant vessel but as a troop transport. It would therefore appear that there is no jurisdiction to entertain the instant suit under the Suits in Admiralty Act itself. *The Western Maid*, 257 U. S. 419, 431; *Bradey* v. *United States*, 151 F. 2d 742 (C. C. A. 2), certiorari denied, 326 U. S. 795. However, in view of the general allegations of the libel, of the cognate provisions of the Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781 *et seq.*) and of the present posture of the instant case, no objection to jurisdiction is now urged.

gence and alleged contributory negligence and assumption of risk by petitioner (R. 7–8).

At the conclusion of the trial, which was held in May, 1947 (R. 18) and in which petitioner conceded the only issue to be the "very narrow" one of negligence—that is, whether petitioner fell into the hold because he slipped on some grease that the shipowner negligently had left on the deck (R. 20)—the district court found that the United States was negligent in leaving the grease on the deck, that petitioner slipped as a result of such negligence, sustaining personal injury damages amounting to $10,549.10, and that there was no contributory negligence on the part of petitioner (R. 129–133).

On appeal, the court below, holding that the negligence of the United States depended upon whether the grease had been on the deck for a period long enough to have been noticed by the officer on watch, unanimously remanded the case to the district court for a specific finding on that issue (R. 150). The district court was further instructed, in the event it should make such a finding, to award damages to petitioner in one-fourth of the amount theretofore decreed since petitioner was "much more negligent" than the United States when he selected the greasy patch to stand in while working on deck (R. 150).

ARGUMENT

1. The court below properly refused to extend the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328

U. S. 85, to a situation in which petitioner, as an employee of an independent contractor, was engaged in cleaning the tanks of the vessel, while it was docked at a shipyard for general repairs and overhauling.

a. In the *Sieracki* case, this Court held that a shipowner is absolutely liable, irrespective of negligence, for injuries caused by his vessel's unseaworthiness to a longshoreman during the period of time when he is actually engaged upon a ship in the loading or unloading thereof. This Court has only recently denied certiorari in a case in which an attempt was made to expand the *Sieracki* case to include longshoremen performing repair, rather than loading or unloading, services on a vessel. *Bruszewski* v. *Isthmian S. S. Co.*, 66 F. Supp. 210, 213 (E. D. Pa.), affirmed, 163 F. 2d 720 (C. C. A. 3), certiorari denied, February 2, 1948 (No. 475, Oct. T. 1947). The soundness of rejecting such an expansion is demonstrated by the fact that the repair services there involved were in no sense a maritime service, similar to that performed by seamen, but were properly work for a shipyard, as is clear from the trial court's opinion in that case. Similarly, this Court has denied certiorari in another case in which the court below refused to hold the shipowner absolutely liable to employees of an independent contractor, engaged in cleaning the ship's tank valves. *Puleo* v. *Moss & Co.*, 159 F. 2d 842 (C. C. A. 2) certio-

rari denied, 331 U. S. 847.[2] The tank cleaning services involved in this instant case, performed through subcontractors as an incident of the general repair and overhauling of the vessel in a private shipyard, are, it is submitted, no different from the services in the cases mentioned and should not therefore be viewed as falling within the scope of the *Sieracki* case.[3]

b. That the applicability of the *Sieracki* case to the facts here involved would be a strained extension of the absolute liability doctrine, is further attested to by the circumstance that petitioner himself never relied upon unseaworthiness in the district court nor in the court below. The gravamen of the libel filed in the district court is negligence, which is of course immaterial in an action based on liability for unseaworthiness.[4] More-

[2] Other federal courts, adhering to the same view, have held the *Sieracki* case inapplicable in similar situations. *Meyers* v. *Pittsburgh Steamship Co.*, 165 F. 2d 642, 644 (C. C. A. 6); *Armento* v. *United States*, 74 F. Supp. 198, 200 (E. D. N. Y.).

[3] In connection with the character of petitioner's services, it should be noted that he is a bricklayer by trade and was assigned to clean the tanks only because of lack of regular bricklaying work (R. 19, 24). Moreover, his express disclaimer of being a "sailor" (R. 36) was confirmed by cross-examination: "Q. And you were on the port or starboard side of the ship? A. You will have to talk from front or back because I don't know much about ships" (R. 31).

[4] In *Desroschers* v. *United States*, 105 F. 2d 919 (C. C. A. 2), certiorari denied, 308 U. S. 519, it was held that even though a suit by a ship's carpenter, based on negligence of the United States as shipowner, was required to proceed in admiralty because of the Suits in Admiralty Act, that requirement did not convert the suit into a proceeding for damages

over, in the course of the trial, petitioner, conceding that the only issue was that of negligence, directed his testimony toward the alleged negligence of the shipowner and made absolutely no effort to establish unseaworthiness. Even before the court below, the petitioner, as expressly stated in that court's opinion, still did not assert any claim based on unseaworthiness. That opinion accurately states that "the only issues are whether the ship was negligent, whether the libellant was guilty of contributory negligence, and what are the proper damages" (R. 145). It is only here (Pet. 6) that the *Sieracki* case is seized upon in an attempt to have this Court consider the expansion of the absolute liability doctrine to situations in which this Court has already declined to consider such extensions.

2. With respect to petitioner's contention (Pet. 6–10) that the court below improperly followed New York rather than federal maritime law, it seems clear that, even if well-founded, petitioner has not been prejudiced thereby. Initially, it must be noted that the discussion of the *Sieracki* case by the court below shows that it would have adopted the federal maritime law of unseaworthiness had the facts of the instant case justified such action. Further indication of the reliance by the court below on federal maritime law is evident from the fact that

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arising out of unseaworthiness and thereby relieve libellant of the need of proving negligence. See also *McGhee* v. *United States*, 165 F. 2d 287, 290 (C. C. A. 2).

it viewed petitioner's contributory negligence not as a bar to any recovery, but only in reduction of damages.[5] In any event, as to the precise question on which the court did refer to New York law—the negligence of a shipowner in allowing oil or grease to accumulate in places where men must work—the federal maritime law, just as the New York law, recognizes that a shipowner has a duty, "to prevent excessive accumulations of oil in places where they would be dangerous to a person rightfully using the deck." *Holm* v. *Cities Service Transportation Co.*, 60 F. 2d 721, 722 (C. C. A. 2); see *McGill* v. *Michigan S. S. Co.*, 144 Fed. 788 (C. C. A. 9), certiorari denied, 203 U. S. 593; *La Guerra* v. *Brasileiro*, 124 F. 2d 553 (C. C. A. 2), certiorari denied, 315 U. S. 824; *Consolidation Coastwise Co.* v. *Conley*, 250 Fed. 679 (C. C. A. 1); *Grillo* v. *Royal Norwegian Government*, 139 F. 2d 237 (C. C. A. 2). Consequently, since petitioner's rights as determined by the applicable federal maritime law would not have produced a result different than that arrived at by the court below, it is clear that the error, if any, was harmless, and

[5] Accordingly, the direction to the district court to reduce the decree to one fourth of the damages originally awarded, if the necessary negligence finding is supplied, was proper and, despite petitioner's contention to the contrary (Pet. 11), not in any way inconsistent with the case of *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, which simply held that the admiralty rule of comparative negligence applies in mitigation of damages in Jones Act suits even though the injuries were sustained as a result of use of defective appliance with knowledge that a safe one was available.

hence does not warrant review. *West* v. *Camden*, 135 U. S. 507, 521; *McCandless* v. *United States*, 298 U. S. 342, 347–348.

CONCLUSION

The decision of the court below is correct, and the alleged conflict as to choice of law could not here produce a different result. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1948.

APPENDIX

Sections 1 and 2 of the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. 741, *et seq.*) provide as follows:

SEC. 1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place

of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court in the United States.

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